



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2005

Ms. Lisa A. Hayes
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901-1196

OR2005-04631

Dear Ms. Hayes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 224190.

The El Paso City-County Health and Environmental District (the "district") received a request for three categories of information pertaining to childhood blood lead testing.¹ You state you will release some of the responsive information. You state and provide documents showing that the district has no responsive information to category two of the request. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ diss'd); Open Records Decision No. 452 at 3 (1986). You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.² We have also reviewed comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

¹The requestor is not seeking the names or addresses of any of the children tested.

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Pursuant to section 552.303(c) of the Government Code, on May 12, 2005, this office sent a notice to the district via facsimile requesting that it provide this office with the district's position regarding the applicability of section 88.002 of the Health and Safety Code to the submitted information. In its response of May 17, 2004, the district argues that the submitted information is confidential under section 88.002(a) and (b).³

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and includes information made confidential by other statutes. Section 88.002 provides in pertinent part:

(a) Except as specifically authorized by this chapter, reports, records, and information furnished to a health authority, a regional director, or the department that relate to cases or suspected cases of children with blood lead levels of concern or lead poisoning are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of childhood lead poisoning and children with blood lead levels of concern are not public information under the open records law, Chapter 552, Government Code, and may not be released or made public on subpoena or otherwise except as provided by this chapter.

(c) Medical, epidemiological, or toxicological information may be released:

- (1) for statistical purposes if released in a manner that prevents the identification of any person;
- (2) with the consent of each person identified in the information;
- (3) to medical personnel, appropriate state agencies, health authorities, regional directors, and public officers of counties and municipalities as necessary to comply with this chapter and related rules;

³The requestor notes in her letter to this office dated May 23, 2005, that the district did not argue the applicability of section 88.002 of the Health and Safety Code to the information at issue in any of its earlier correspondence to this office. However, because the Act prescribes criminal penalties for the release of confidential information, this office will address the applicability of a confidentiality statute such as section 88.002 even if it was not timely raised by a governmental body. See Gov't Code §§ 552.007, 352; Open Records Decision No. 325 at 2 (1982).

(4) to appropriate federal agencies, such as the Centers for Disease Control and Prevention of the United States Public Health Service, except that the information must be limited to the information requested by the agency; or

(5) to medical personnel to the extent necessary in a medical emergency to protect the health or life of the child identified in the information.

Health and Safety Code § 88.002(a), (b), (c). In your correspondence to this office dated March 16, 2005, you informed us that:

the data contained in the attached reports (Exhibits C and E1) is received by the [district] from the Department of State Health Services. The State mandates (through the Texas Administrative Code) that medical providers report any elevated lead test result to the local health authority or the Department of State Health Services. [see 25 TAC § 37.333 *et seq.*] The State filters the data they collect and transmits to the local health authority the test results for the appropriate region (in this case, El Paso County). The local health authority then bears the responsibility of conducting any necessary investigations and may provide follow-up testing if needed. In some cases, the initial lead test result may also have been conducted by the [district] through one of its local health clinics. Upon investigation, the [district] generates the appropriate investigation documents (Exhibits D and E2).

In your letter of May 17, 2005, you further stated that “while not every test result indicates a blood lead level of concern or case of lead poisoning, those cases are included in the data transmission responsive to the subject request.” Based upon your representations, we understand you to assert that the submitted information pertains to cases or suspected cases of children with blood lead levels of concern or lead poisoning. In addition, you informed us that the district is supervised and managed by Dr. Jorge Magana, who is the Health Authority for El Paso County, designated in accordance with section 121 of the Health and Safety Code. See Health and Safety Code § 121.021 (health authority is a physician appointed under the provisions of chapter 121 to administer state and local laws relating to public health within the appointing body’s jurisdiction; *see also* Health and Safety Code § 88.001(3)(“health authority” for purposes of chapter 88 of the Health and Safety Code “means a physician appointed as such under Chapter 121”). We further note that, according to the district’s publicly available website, that Dr. Magana is the director of the district.⁴ On this basis and upon our review of the submitted information, we conclude that the

⁴See <http://www.elpasocitycountyhealth.com/AboutUs/ContactUs/ContactUs.asp>

information submitted as Exhibits C through E is confidential under sections 88.002(a) and (b) and may only be released in accordance with chapter 88 of the Health and Safety Code.⁵

The requestor asserts in her correspondence to this office that the release of the requested information would be for statistical purposes under section 88.002(c)(1) of the Health and Safety Code. The district states that “none of the exceptions to the statutory prohibitions against disclosure apply,” including the release provision in section 88.002(c)(1). Whether a release of information subject to section 88.002 of the Health and Safety Code is for statistical purposes is a question of fact. This office cannot resolve questions of fact in the open records process, but instead must rely on the representations of the governmental body requesting our opinion. *See generally* Open Records Decision Nos. 554 (1990), 552 (1990). Accordingly, we conclude that the submitted information is confidential under section 82.002 of the Health and Safety Code, and must be withheld from the requestor under section 552.101 of the Government Code. As we are able to make this determination, we need not address your other arguments against disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll

⁵In support of our conclusion, we note that the information in Exhibits D and E2 consist of documents entitled “El Paso City-County Health and Environmental District Childhood Lead Poisoning Program Lead Poisoning/EBLL Case Investigation.”

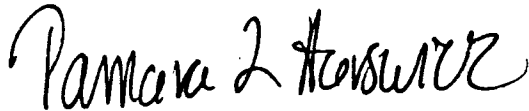
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Tamara L. Harswick". The signature is fluid and cursive, with the first name "Tamara" being more prominent.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 223627

Enc. Submitted documents

c: Ms. Teresa S. Montoya
Montoya PR
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(w/o enclosures)